Supreme Court, U.S.
FILED
JAN 20 1983
ALEXANDER L. STEVAS
CLERK

No. 82-195

IN THE

Supreme Court of the United States

October Term 1982

VAN D. MUELLER and JUNE NOYES,
Petitioners,

v.

CLYDE E. ALLEN, JR., DENNIS J. BERTHIAUME, KAREN F. BERTHIAUME, THOMAS W. DZIK, MARY J. DZIK, EDWARD F. FUJAN, JOLEEN A. FUJAN, BRENDA E. BECKER, RICHARD C. HOLLINGSWORTH, MARJORIE HOLLINGSWORTH, ROGER DeHAAN and DOROTHY DeHAAN,
Respondents.

BRIEF FOR RESPONDENT CLYDE E. ALLEN, JR., MINNESOTA COMMISSIONER OF REVENUE

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224-7631 — Rivier Publishing Co., 257 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTION PRESENTED

Whether a Minnesota statute violates the establishment clause of the first amendment to the United States Constitution by providing a state income tax deduction for a broad range of expenses actually incurred by a taxpayer's dependents attending either public or private school?

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Taussig, Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions, 20 National Tax Journal 1 (1967)	13
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Respondents.

BRIEF FOR RESPONDENT CLYDE E. ALLEN, JR., MINNESOTA COMMISSIONER OF REVENUE

STATEMENT OF THE CASE

In this case, the petitioners seek a declaration that Minn. Stat. § 290.09, subd. 22 (1980) violates the establishment clause of the first amendment to the United States Constitution. That statute authorizes a Minnesota income tax deduction for certain school-related expenditures made by taxpayers on behalf of their dependents attending either public or private schools. On cross-motions for summary judgment, the district court upheld the validity of the challenged statute. That decision was affirmed by the Eighth Circuit Court of Appeals.

A. The Challenged Statute.

Minn. Stat. § 209.09, subd. 22 (1980), authorizes Minnesota taxpayers to claim income tax deductions for tuition, textbook, and transportation expenditures made on behalf of their dependents. Tax deductions of this type are not new in Minnesota. The challenged provision was originally enacted as 1955 Minn. Laws, ch. 741 and provided as follows:

> The following deductions from gross income shall be allowed in computing net income:
>
> . . . .
>
> (19) The amount he has paid to others for tuition of each dependent and the cost of transportation of each dependent in attending an elementary or secondary school; provided that the deduction for each dependent shall not exceed $200.

This provision continued in force without amendment until 1976. In that year, the maximum deduction amounts were increased from $200 to $500 for elementary school students and $700 for secondary school students. These increases did little more than adjust the original amount in response to inflation. The present version was adopted as 1976 Minn. Laws, ch. 37:

> Subdivision 1. The following deductions from gross income shall be allowed in computing net income . . .
>
> . . . .
>
> Subd. 11. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, where-

> in a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and Minnesota Statutes, Chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.

As indicated by the above-quoted language, this deduction is not restricted to taxpayers whose dependents attend schools operated by churches or religious organizations. Rather, the deduction is available to all taxpayers who incur the described school-related expenses on behalf of dependents attending any qualifying public or nonpublic school. The expenses that may be deducted under this statute are sufficiently varied that every taxpayer in the State of Minnesota whose child attends public or private school is likely to incur some of them. In addition to regular tuition (which includes tuition paid by public schoolchildren attending school in districts other than that in which they reside), other deductible items are driver's training tuition, summer school tuition, and tuition charged by schools to tutor slow learners. Memorandum from G. Caulfield, January 7, 1980 (J.A. 23-24). The cost of basic school supplies such as paper and pens are deductible, as is the cost of gym uniforms and shoes. The cost of supplies for home economics, art and shop courses is deductible. So, too, is the rental fee for band instruments, cameras, ice skates and calculators. Memorandum from G. Caulfield, March 27,

1979 (J.A. 17-22). Finally, the cost of public bus or taxi fare incurred in transporting a child to his school is deductible. *Id.*

While public schools in Minnesota do not charge fees for some of these items, Minn. Stat. § 120.73 (1980) identifies numerous items for which fees may be charged. In addition, Minn. Stat. § 120.75 (1980) gives the State Board of Education authority to identify additional fees which may be charged. Accordingly, parents of children in public schools have substantially benefited from the statute. In 1978-1979, Minnesota residents paid more than two million dollars to public schools for tuition alone. They paid nearly one million dollars in fees to public schools during the same period. Affidavit of Ronald Moir (J.A. 38). These amounts do not even include summer school driver education tuition, tuition to schools in states bordering Minnesota, payments to nonsectarian private schools for summer school, and deductible expenses paid to those other than schools.

The deduction authorized by Minn. Stat. § 290.09, subd. 22 (1980) is claimed on the standard Minnesota individual income tax return in the same manner in which other income tax deductions are claimed by Minnesota taxpayers. For example, a taxpayer who chooses to use the state's standard deduction[1] rather than itemize deductions does not benefit from the challenged provision. Moreover, the challenged statute pertains only to actual expenses incurred and does not provide for direct grants to Minnesota residents.

The revenue loss to the State of Minnesota by reason of the challenged statute was estimated at 2.4 million dollars for the year 1978.

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[1] Minn. Stat. § 290.09, subd. 15 (1980) provides a standard deduction equal to ten percent of a taxpayer's adjusted gross income or $2,000, whichever is least.

B. History of the Case.

Minn. Stat. § 290.09, subd. 22 was originally challenged as violating the establishment clause in *Minnesota Civil Liberties Union v. Roemer*, 452 F. Supp. 1316 (D. Minn. 1978). The three-judge panel there upheld the statute, finding it to be a true tax deduction which does not violate the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The *MCLU* decision was not appealed.

In 1980, the present action was commenced by five plaintiffs. However, early in the litigation, the district court dismissed three of the plaintiffs because they had possessed an interest in the earlier, unsuccessful challenge in *MCLU*.[2] The defendants below and respondents here are the Commissioner of Revenue of the State of Minnesota and two groups of independently represented taxpayers who intervened in support of the challenged statute.

In March, 1981, the plaintiffs, the defendant Commissioner, and the defendant intervenors brought cross-motions for summary judgment, relying largely upon information and affidavits supplied by employees of the Minnesota Department of Education and the Minnesota Department of Revenue (J.A. 5-38). On May 13, 1982, the district court denied the plaintiffs' motion, granted the defendants' motions and dismissed the complaint. In its opinion, the court rejected the plaintiffs' position that the statute benefits only a narrow class of recipients, expressly finding that "the statute provides widely distributed tax relief" to Minnesota taxpayers. *Mueller v. Allen*, 514 F. Supp. 998, 1002 (D. Minn. 1981).

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[2] The Commissioner of Revenue has maintained throughout this litigation that the *MCLU* case was a representative taxpayer action and that the current action is barred by res judicata.

The plaintiffs appealed to the Eighth Circuit Court of Appeals which affirmed the lower court decision on April 30, 1982. Like the district court, the court of appeals specifically found that the statute provides "substantial benefits flowing to all members of the public." *Mueller v. Allen*, 676 F.2d 1195, 1205 (8th Cir. 1982).

The plaintiffs' petition to this Court for a Writ of Certiorari was granted on October 4, 1982.

SUMMARY OF ARGUMENT

The court of appeals properly applied Supreme Court precedent in upholding the Minnesota income tax deduction challenged in this case. Under the statute, Minnesota taxpayers are permitted to deduct from the computation of their taxable income that portion of their income which has been devoted to any of a broad range of educational expenses incurred by dependents attending either public or private schools within Minnesota or its bordering states. The lower courts concluded that the deduction does not violate the establishment clause of the first amendment.

The central demand of the establishment clause is neutrality. In assessing the neutrality of any state law, this Court has applied a three-prong analysis. Statutes have been upheld where they evince a secular public purpose, have a primary effect which neither advances nor inhibits religion, and do not result in the entanglement of church and state. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The controversy in this case, both in front of this Court and before the lower courts has primarily concerned the primary effect prong of the establishment test.

Since the policy to be enforced in establishment cases is neutrality, the critical concern is that religious organizations

do not receive favored or special treatment. Establishment policy does not require that religious organizations be isolated from benefits available to the general citizenry. Thus, this Court has never struck down any provision, such as the one here, which applies to the entire class of taxpayer-parents of schoolchildren. *Board of Education v. Allen*, 392 U.S. 236 (1968); *Everson v. Board of Education*, 330 U.S. 1 (1947).

In upholding the challenged statute, the court of appeals focused its analysis on the degree to which the statute benefits a broad and internally pluralistic class of beneficiaries, and the degree to which any benefits derived by religious institutions are passive and indirect. Unlike other tax provisions which the Court has found to be invalid, the Minnesota deduction benefits taxpayers whose children attend either public or private schools. The benefits enjoyed by taxpayers whose children attend schools with no religious affiliation are numerous and substantial. The deduction, therefore, has neither the appearance nor the practical effect of establishing a limited class entitled to favored treatment.

Both lower courts found that significant deductions were available to parents of children attending secular institutions, whether they be public or private. While the petitioners submitted factual analyses intended to prove that the practical effect of the statute was to advance religion, the courts below found the arguments unpersuasive. Not only were the analyses flawed and incomplete, they were premised upon the erroneous assumption that the constitutionality of the deduction depends upon whether, in any given year, parents of sectarian students benefit more than parents of secular students. Prior decisions of the Court have established no such rigid or arbitrary test.

Equally important is the mechanism by which benefits are extended to members of the class. The challenged deduction

is a true deduction bearing no analytical resemblance to those tuition grant programs under which the tax laws are merely a vehicle for transferring carefully calculated benefits to those attending private schools. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) [hereinafter cited as *Nyquist*]. Rather, the deduction is the constitutional equivalent of other provisions under which governments abstain from taxing either property or income which has been devoted to charitable, educational, or religious purposes. *See Walz v. Tax Commission*, 397 U.S. 664 (1970) [hereinafter cited as *Walz*]; I.R.C. § 170.

There can be little doubt that the challenged deduction possesses a valid secular purpose. The deduction is intended to increase the ability of Minnesota taxpayers to provide their children with a safe, effective, and varied education. By reducing the effect of the Minnesota income tax on taxpayers' ability to choose among various educational institutions, programs and activities, the challenged statute furthers a valid and secular state interest.

The deduction does not promote entanglement of church with state. The law engenders no administrative entanglement. Educational expenses qualify for the deduction if they are incurred by students attending any public or nonprofit institution which complies with compulsory attendance and civil rights laws. The enforcement mechanism applicable under the statute is a routine audit of individual taxpayers. Thus, the potential for entanglement is no greater than that associated with review of a charitable contribution to a purportedly religious organization or charity. I.R.C. § 170. Nor does the statute engender political entanglement. Because the state merely abstains from taxing income devoted to a particular purpose and does not extend grants of aid requiring

annual appropriations, there is little potential for the political friction generally thought to accompany such programs. Indeed, although the deduction has existed for nearly thirty years, nothing presented to the courts below suggests that it has engendered church-state entanglement.

ARGUMENT

I. MINN. STAT. § 290.09, SUBD. 22 DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

A. Introduction.

The statute at issue here is a tax deduction available to the parents of all elementary and secondary schoolchildren. It was enacted in its original form in 1955 and has engendered no administrative or political controversy. Plaintiffs' attack on the measure rests upon their argument that the provision impermissibly benefits those parents who elect to send their children to religiously affiliated schools. They believe that any benefit accorded to these parents violates that separation of church and state demanded by the establishment clause.

The establishment clause, however, does not require strict or absolute separation of church and state. It does not require that religion be isolated from public benefits or services available to all. Rather, its central demand is that the state remain neutral toward religion, adopting neither laws which are hostile to it nor those which advance it. Thus, this Court has repeatedly rejected as practically impossible and constitutionally unnecessary the strict separation sought by those who urge isolation of religious institutions from passive and incidental state-law benefits. *Committee for Public Education*

and Religious Liberty v. Regan, 444 U.S. 646 (1980); *Wolman v. Walter*, 433 U.S. 229, 263 (1977) (Powell, J., concurring); *Walz, supra*; *Everson v. Board of Education, supra.*

The rejection of strict separation has been particularly apparent in recent decisions upholding direct reimbursements to sectarian schools for the costs of taking attendance and administering state-required tests, *Committee for Public Education v. Regan, supra*, and requiring that religious groups be permitted use of university meeting rooms. *Widmar v. Vincent*, 102 S. Ct. 269 (1981). In both cases, the establishment clause was no barrier even to the active provision of benefits to religious organizations.

In cases involving tax laws, the Court has been equally reluctant to require absolute separation. In *Walz, supra*, the Court approved the "benevolent neutrality" of property tax exemptions for religious and other charitable institutions. In the same case, the Court strongly suggested the validity of section 170 of the Internal Revenue Code which provides federal income tax deductions for religious and charitable contributions. In contrast, however, the Court invalidated the special grants and equivalent tax benefits available only to a small, predominately sectarian class. *Nyquist, supra.*

While determination of what is a neutral statute has proven difficult, it is now settled that the standard to be applied is the familiar three-part test enunciated in *Lemon v. Kurtzman, supra.* A statute must (1) possess a valid secular purpose, (2) have a primary effect which neither advances nor inhibits religion, and (3) not result in excessive state entanglement with religion. In this case, the lower courts concluded that the challenged Minnesota deduction fulfilled all three requirements of this test.

Throughout this case, the second or "primary effect" test has been most clearly implicated and emphasized by the plain-

tiffs. Before this Court as well, the plaintiffs place primary emphasis on that test.

B. The Challenged Provision Does Not Violate the Primary Effect Test.

Under the second prong of the *Lemon* test, a statutory provision must have a primary effect which neither advances nor inhibits religion. The exact definition of primary effect has proved elusive. However, one element of certainty does exist within the cases. The primary effect of a statute cannot be determined by tidy statistical calculations of whether a statute occasions benefits to religious organizations which are proportionately larger than those accorded others. If a statute is otherwise neutral (1) in its scope of application and (2) in its method of operation, the statute will be upheld even if religious institutions derive substantial benefits from the statute. *Walz, supra.* Neutrality in the scope of a statute's application is determined by the breadth of the class affected by the statute. Neutrality in its operation is determined by the degree to which a statute acts passively and does not constitute an affirmative aid to religious institutions. Application of these indicia of neutrality to this case establishes that the challenged provision does meet the requirements of the primary effect test.

1. Breadth of Class.

In determining whether a statute is essentially neutral, the Court has looked to the nature of the class benefited by the statute. Where that class is broad and internally pluralistic, the statute has been found constitutional. In *Board of Education v. Allen, supra,* and *Everson v. Board of Education, supra,*

the fact that the statutorily benefited class included parents of children in either public or private schools was central to the Court's decision upholding the statutes.[3] In contrast, the Court in *Nyquist, supra*, distinguished *Allen* and *Everson* on the ground that parents of public school children were excluded from the special class of beneficiaries under a tax credit scheme. *Nyquist, supra* at 782, n.38. *See Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3d Cir.), *aff'd mem.*, 442 U.S. 907 (1979).

In this case, the challenged statute does not create a special class of beneficiaries. The class is not limited to taxpayers sending children to private school. Rather, it embraces those sending children to public or private school in Minnesota and its four bordering states. Thus, the courts below found that the statute provides widely distributed tax relief to Minnesota taxpayers. *Mueller v. Allen, supra*, 676 F.2d at 1205; *Mueller v. Allen, supra*, 514 F. Supp. at 1002.

Plaintiffs' factual argument is intended to contradict the lower courts' conclusion. Petitioners' Brief at 42, B-1. They contend that, as a practical matter, some of the benefits conferred by the deduction provide no significant benefit to parents of public school students. Thus, they argue, the class of beneficiaries under the deduction is not a broad one. Yet, even plaintiffs admit that the deduction provides some bene-

[3] The statutes at issue in *Allen* and *Everson* were drawn to apply to public and nonpublic elementary and secondary students. On the other hand, the statutes at issue in the cases on which the plaintiffs primarily rely, such as *Nyquist* and *Lemon*, applied only to nonpublic students. *See also Public Funds for Public Schools v. Byrne*, 590 F.2d 514 (3rd Cir.) *aff'd mem.*, 442 U.S. 907 (1979). As far as the defendants are aware, this is the first case since *Allen* involving a statute which extends benefits to all elementary and secondary students.

fits to those parents. Petitioners' Brief at 44. Thus, even assuming plaintiffs' factual analysis is correct, it is largely irrelevant.[4]

The challenged statute is constitutional because on its face and in practice it extends its benefits to the entire class of Minnesota taxpayers whose dependents attend elementary and secondary school. There is no authority for plaintiffs' contention that this Court should endeavor to determine the constitutionality of the challenged section by scrutinizing the particular extent to which parents whose children attend sectarian schools have claimed more income tax deductions than parents whose children attend nonsectarian schools. The Court has upheld statutes against similar constitutional attacks without entering into the type of scrutiny sought by plaintiffs. In *Walz, supra,* the Court validated the New York tax exemption without ever inquiring into whether either religious institutions, or those attending them, would receive a greater monetary benefit than other institutions or individuals. In the same case, the Court strongly suggested the constitutionality of section 170 of the Internal Revenue Code, under which well over half of the money deducted has historically been contributed directly to churches and related religious organizations.[5] Further, in *Board of Education v. Allen, supra,* and *Everson v. Board of Education, supra,* the Court found that the broad class of beneficiaries under the challenged legislation was sufficient to establish the statutes' neutrality. The Court has never indicated that it must first

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[4] As demonstrated below, however, benefits enjoyed by parents of public school students are substantial. See p. 16, *infra.*

[5] *See* Taussig, *Economic Aspects of the Personal Income Tax Treatment of Charitable Contributions,* 20 National Tax Journal 1 (1967); Nelson, *Private Giving in America 1960-1972,* in I Research Papers Sponsored by the Commission on Private Philanthropy and Public Needs 115, 132 (1977).

determine whether students attending parochial schools would derive a larger or smaller benefit than those attending public schools. The Court has consistently maintained this approach.

In *Nyquist, supra*, for example, the Court found it critically important that the parents of public schoolchildren were excluded from benefiting under the tax credit statute. *Id.* at 782 n.38. This was true although there was no evidence in that case that tuition grants would have provided substantial benefits to the parents of public schoolchildren. Thus, in *Nyquist*, the issue was graphically framed as whether or not the statute's benefits were generally available to all similarly situated taxpayers. Only because those benefits extended to a limited and special class of taxpayers, was it necessary to scrutinize the extent to which that special class was sectarian. A similar result obtained in *Public Funds for Public Schools v. Byrne, supra*. In that case, certain benefits were available only to the narrow class of parents whose dependents attended nonpublic schools. Because that class was so narrow, detailed scrutiny was required. Indeed, the court in *Byrne* distinguished that case from *MCLU v. Roemer, supra*, precisely because of the narrowness of the class involved. *Byrne, supra*, 590 F.2d at 519 n.8.

The approach reflected in these cases is and has been warranted by sound establishment theory. When a narrow class of beneficiaries is legislatively designated, special treatment of that class is necessarily inherent in the classification. The question then becomes, in establishment cases, whether the population receiving the special treatment is predominately sectarian.[6] The concern is whether the legislature has singled

[6] This question does not end the inquiry, however. Even if there is some measure of special treatment to a narrow class, the provision may nonetheless be upheld if the extent of the special treatment is not improper. *Committee for Public Education and Religious Liberty v. Regan, supra.*

out religious organizations for favorable treatment, a concern which appropriately implicates establishment values. When there is no special designation in the legislative provision and benefits are available to all, the implication of favored treatment is not warranted. "The Establishment Clause does not prevent a state from extending the benefits of state law to all citizens without regard for their religious affiliation." *Board of Education v. Allen, supra,* 392 U.S. at 242 (citing *Everson v. Board of Education, supra,* 330 U.S. at 17).

It is not submitted that, simply because a statute on its face applies to all citizens, further inquiry is foreclosed. Certainly statutes could be constructed which, although applicable to all persons on its face, in fact apply only to a limited class. Thus, in reviewing a nominally broad classification, the test is whether the statute either explicitly or implicitly designates only a limited class. If the statute does work to specially designate a class, establishment concerns are implicated. However, no such statute is present here. Both lower courts expressly found that the statute extends substantial benefits to the entire class of taxpayers whose children attend qualifying schools. See pp. 6, 12, *supra.*

Thus, plaintiffs' request that the Court adopt a test dependent upon a determination of which group of beneficiaries statistically receives the greater tax benefit must be rejected. No such test heretofore has been used. If the Court were to adopt such a test, it is apparent that the *Walz* decision would have to be reversed and section 170 of the Internal Revenue Code struck down because religious organizations have traditionally been the prime dollar beneficiaries of tax savings measures. See n.5, *supra.* More importantly, plaintiffs offer no legal theory to support their "biggest dollar" approach to establishment clause jurisprudence. The establishment clause

requires neutrality. It does not require that religious organizations come out second best under neutral programs.

Plaintiffs, however, fare no better even under a detailed scrutiny of the financial effects of the challenged statute. In the lower courts, plaintiffs attempted to show that the practical effect of the challenged statute was to aid religious institutions. However, plaintiffs incorrectly assumed that only full-time tuition payments by students within Minnesota were deductible and ignored most items actually deductible under the challenged provision, including tuition payments of public school students and nontuition items. In fact, availability of the deduction simply is not limited to parents of those attending sectarian schools.

The Minnesota deduction extends benefits likely to be enjoyed by secular as well as sectarian students. Indeed, both lower courts expressly found that substantial benefits were derived by those sending children to public school. See p. 12, *supra*. Expenses for materials and equipment are deductible if they are (1) primarily for class rather than personal use, (2) consumed in the normal course of the class, and (3) constitute the basic minimum required expense. Thus, mundane expenditures, such as those for pencils and notebooks, are deductible. So, too, are the costs of materials for art, shop, and home economics classes. The cost of gym clothes for physical education classes is deductible. Rental fees paid to schools for a camera, a band instrument, ice skates, or a calculator are deductible. Memorandum from G. Caulfield, March 27, 1979 (J.A. 17-22). While public schools in Minnesota do not charge fees for some of these items, Minn. Stat. § 120.73 (1980) identifies numerous items for which fees may be charged. In fact, public school students paid nearly one million dollars in fees and more than two million dollars in tuition during 1978-1979. Affidavit of Ronald Moir (J.A.

38). Thus, plaintiffs' reliance on a 1976 revenue memorandum which suggests that the deduction is only of importance to private school parents is misplaced. Petitioners' Brief at 38. The 1979 memoranda referred to above are part of the record of this case, unlike the 1976 memorandum relied upon by the plaintiffs. Those memoranda show the broad scope of benefits available to public school students.[7] They demonstrate that the 1976 memorandum was incorrect in its estimation of the deduction's scope at the time it was prepared and now.

Since plaintiffs artificially selected only a limited number of available deductible items in their statistical analysis, the district court found that their argument "lack[ed] credibility by reason of omissions of serious significance." *Mueller v. Allen, supra,* 514 F. Supp. at 1003. As a result, the court rejected plaintiffs' position that the statute benefits only a narrow class and found that "the statute provides widely distributed tax relief" to Minnesota taxpayers. *Id.* at 1002. These findings should only be reversed by this Court upon a finding that they were clearly erroneous. *Roemer v. Board of Public Works,* 426 U.S. 736, 758 (1976). The record, however, strongly supports the district court's conclusions.[8]

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[7] Prepared after a three-judge federal court had already ruled the deduction constitutional, *MCLU v. Roemer, supra,* the 1979 memoranda were not intended to affect the outcome of any litigation. Instead, they were intended to guide the revenue department in applying the law.

[8] In an effort to overcome their failings before the district court, plaintiffs attempted to draw new conclusions from their data before the court of appeals. However, the calculations remained flawed by the same omissions which rendered plaintiffs' earlier arguments "not credible." As a result, the court of appeals, like the district court, rejected plaintiffs' argument and found "substantial benefits flowing to all members of the public." *Mueller v. Allen, supra,* 676 F.2d at 1205.

Before this Court, plaintiffs once again parade the same statistics arguing that they demonstrate a fatal flaw in the Minnesota deduction. Petitioners' Brief at 42-45. However, plaintiffs' calculations remain as fundamentally meaningless as when they were first presented. Plaintiffs continue to omit from their analysis deductions available for summer school tuition, tuition paid by Minnesota children attending schools in bordering states, textbook expenses, and costs borne by virtually every child attending elementary or secondary school in the state, including gym clothes, school materials, and travel expenses.[9] Plaintiffs baldly assert that the money deducted for these amounts is *de minimis*, Petitioners' Brief at 43 n.17, but they present no evidence to support this assertion. As the district court correctly found, such omissions are critical and destroy the credibility of plaintiffs' statistical analysis.

Plaintiffs, however, have made one final attempt to overcome the inadequacy of their factual argument. They contend that, even if their evidence does not establish the statute's unconstitutionality, it has shifted the burden of establishing

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[9] Plaintiffs' statistical analysis is further eroded by the most recent data on the deduction's effect which reveals that over two-thirds of those claiming deductions in 1980 did so for amounts below the national average charge for sectarian school tuition. As set forth in Petitioners' Brief at 8, the national average for tuition was $420 for sectarian elementary schools and $976 for sectarian secondary schools. U.S. Department of Commerce, Private School Enrollment, Tuition, and Enrollment Trends: October, 1979, at 27. Of the estimated 85,749 returns on which the challenged deduction was used in 1980, 58,462, or 68 percent, indicated a deduction of less than $400. More than 44,800, or about 52 percent, of the returns indicated deductions of less than $200. Nearly 30,000, or about 34 percent, of the returns showed deductions of less than $100. Minnesota Department of Revenue, Distribution of Dependent Expenses Deduction By Size of Dependent Expenses Deduction ($100 brackets) Estimated from a Sample of 1980 M-1 Returns, October 28, 1982. (Appendix A at A-1).

the statute's neutrality to the state. They suggest that they have made a prima facie showing of the "likelihood" that the statute has an impermissible primary effect. This, they assert, is sufficient to require the state to produce facts "disproving" their own faulty analysis. Their contention is unsupportable for a number of reasons. First, the findings of the district court establish that the *only* credible evidence on this issue favors the defendants. Thus, it is of no matter on whom the burden of proof rests. Second, even if one assumes their analysis to be correct, the fact that more of the revenue loss under the deduction is attributable to sectarian expenditures than to secular expenditures fails to establish any constitutional violation, prima facie or otherwise. See section I.B.2., *infra*. Third, plaintiffs rely in their analysis on Title VII cases which are completely inapposite here since the legal standard applicable to such cases is statutorily rather than constitutionally derived. *See Washington v. Davis*, 426 U.S. 229, 246-7 (1976). More relevant might be equal protection cases under which a plaintiff must demonstrate an improper purpose as well as disparate impact in order to prevail. *Id.* Under this standard, plaintiffs' challenge would surely fail, since there can be little doubt that the statute has a valid secular purpose. See section I.C., *infra*. Thus, there is no reason for the state to bear the burden of establishing the constitutional validity of the statute. Even in the Title VII cases cited by plaintiffs, "the ultimate burden of persuading the trier of fact . . . remains at all time with the plaintiff." *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

In sum, plaintiffs' attempts to characterize the deduction as only assisting the parents of students in sectarian schools is not supported by the facts. Both on its face and as a practical matter, the statute makes available a broad class of

benefits to a broad class of taxpayers which includes parents of students in schools which are both private and public, secular and sectarian. As a result, the statute is eminently neutral and does not have the primary effect of advancing religion.

2. Passive Effect.

The second critical factor in primary effect analysis is whether any benefit the challenged statute may occasion to religious institutions is passive, or is an affirmative grant of aid. Accordingly, in *Walz, supra*, a property tax exemption for religious institutions was held constitutional because the Court found that abstention from taxation did not establish religion. Similarly, the Court in that case strongly suggested the validity of section 170 of the Internal Revenue Code which provides a federal income tax deduction for contributions to religious and charitable institutions. *Walz, supra*, 397 U.S. at 676 n.4. In *Nyquist, supra*, on the other hand, the New York tuition grant provisions were found to be an affirmative benefit. There, the state had not simply abstained from taxing income which its residents might choose to devote to a range of educational expenses. Rather, it had actually paid certain residents for having exercised that choice in a particular way.

The crucial distinction between *Walz, supra*, and section 170 on one side, and *Nyquist, supra*, on the other, lies not in the absence of any benefit to religious institutions. Some "aid" is inherent in all three programs. Rather, the distinction lies simply in the difference between active and passive "aid." The basis of this distinction cuts to the very heart of the meaning of establishment. Affirmative grants of aid, like the term "establishment" itself, denote the type of active support forbidden by the first amendment. Passive measures, on the

other hand, neither literally nor figuratively "establish." As Justice Brennan has explained, "[t]ax exemptions . . . constitute mere passive state involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy." *Walz, supra*, 397 U.S. at 691. (Brennan, J., concurring.)

Plaintiffs' contention that the Minnesota deduction is constitutionally distinct from the *Walz* exemption and the section 170 deduction is unsupportable. They choose to identify the property tax exemption as the "failure to tax at all," the deduction for contributions to churches as "decentralized" decisions concerning the "allocation of social resources," and the Minnesota deduction as "reimbursements of user fees." Petitioners' Brief at 20-24. However, plaintiffs wholly fail to explain why this classification system has any constitutional significance.

In an attempt to give their system of labels some significance, the plaintiffs suggest that establishment concerns have prompted the Internal Revenue Service to make certain "user fees" nondeductible. Petitioners' Brief at 25. This argument is both irrelevant and untrue. The Service's reasons for doing so are entirely unrelated to the establishment clause. Instead, the purpose is to distinguish "sales" from "contributions" in order to prevent false characterizations of transactions made to obtain a deduction which Congress could provide but has chosen not to provide. *See Winters v. Commissioner*, 468 F.2d 778, 780-81 (2d Cir. 1972).[10] Furthermore, some "user fees," such as pew rentals and periodic dues paid to churches, are

[10] There is even doubt whether Congress intends that contributions devoted to educational purposes be nondeductible. In the 1980 Appropriations Act, Congress prohibited enforcement of the revenue ruling designed to accomplish that result. Rev. Rul. 79-99, 1979-2 C.B. 473; Pub. L. No. 96-74, § 614, 93 Stat. 576 (1979).

deductible under section 170. Rev. Rule 70-47, 1970-1 C.B.49. Under plaintiffs' theories, deductions for these items would amount to a direct subsidy of religious worship.

Under the establishment clause, the important distinctions lie not with the system of labels urged by plaintiffs. Instead, they lie in the passive or active form of "aid" to religious institutions. In their passive effect, the *Walz* exemption, section 170 and the Minnesota deduction are indistinguishable. A deduction for payments to a religious institution, be they for purely charitable purposes or in exchange for a service provided by the religious institution, will produce some form of "aid" to that religious institution. Indeed, under section 170, a deduction is available for direct grants to churches. Those institutions plainly benefit more from direct contributions for which they must provide no service than from payments for a service which they have rendered. Thus, the Minnesota deduction for educational expenses provides benefits to religion which are even more passive and constitutionally innocuous than the section 170 deduction for direct charity to religious institutions or the *Walz* exemption for property devoted to religious purposes.

Plaintiffs are equally incorrect in their argument that the Minnesota deduction is distinct from section 170 because it unconstitutionally "rewards" or "subsidizes" individuals for a specific activity. Petitioner's Brief at 23-27. First, plaintiffs are wrong when they argue that only a narrow range of activities triggers the deduction. A broad range of educational expenses are deductible. See pp. 16-18, *supra*. Second, where property put to religious purposes is exempt from taxation, as in *Walz*, the law may be said to "subsidize" the use of property for those purposes. Similarly, section 170 may be said to "subsidize" contributions to religious organi-

zations. Yet, those tax provisions equally may be said to be a governmental effort not to "inhibit" the activities of exempt organizations. *Walz, supra,* 397 U.S. at 672-73. The Minnesota deduction is just such an effort. Under its terms, the inhibiting effect of the income tax on a taxpayer's choice of schools and programs is reduced. Its effect is at least as passive as that of section 170. Section 170, it must be emphasized, allows a deduction for direct payments to the very same religious school to which, plaintiffs claim, a deductible payment under the challenged statute would be unconstitutional.

Plaintiffs also are incorrect in their contention that the tax credit in *Nyquist, supra,* and the deduction in the instant matter are indistinguishable in their operation and effect. Petitioner's Brief at 61. At issue in *Nyquist* were two closely linked programs for making tuition grants to those attending private schools. The first was a direct grant from the state treasury to those low-income residents sending their children to nonpublic school. The second was intended to accomplish the same purpose for moderate-income taxpayers; the tuition grant was simply paid as a tax credit. The Court found the two programs inseparable. *Nyquist, supra,* 413 U.S. at 791 n.50. Thus, the distinction between the program in *Nyquist* and the deduction in this case is the distinction between an affirmative grant and an abstention from taxation. The distinction is one which the Court in *Walz* indicated was the difference between unconstitutionality and constitutionality. *Walz, supra,* 897 U.S. at 675.

Moreover, even if the tax credit in *Nyquist* could have been distinguished from the tuition grant for the purposes of constitutional analysis, it is apparent that the challenged deduction is not the theoretical or functional equivalent of the

Nyquist credit.[11] As the Court found in *Nyquist*, a tuition tax credit directly benefits religion for two reasons: (1) a credit offers the taxpayer a predetermined amount of tax forgiveness, and (2) a credit constitutes an arbitrary reduction in income. Minnesota's true deduction, however, possesses neither characteristic. First, a true deduction does not result in a predetermined amount of tax forgiveness because, unlike a credit, it does not result in a dollar for dollar rebate of funds expended. Rather, the benefit conferred by a true deduction is designed to parallel the burden placed by the tax system on those choosing among public schools, private secular schools and private sectarian schools. A progressive income tax burdens taxpayers in direct correlation to their income; those with greater income pay a larger proportion of the tax. Thus, a tax benefit designed to reduce the effect of a progressive income tax on one's ability to select a particular type of education necessarily confers benefits in proportion to the taxpayer's income. In *Nyquist*, the legislature had devised a plan designed "to assure that each family would receive a carefully estimated net benefit" regardless of income. *Nyquist*, *supra*, 413 U.S. at 790. The Minnesota legislature has devised no such plan.

Second, the Minnesota deduction does not result in arbitrary reduction of the taxpayer's income as occurred in *Nyquist*.

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[11] As a matter of tax theory, credits and deductions are often recognized to serve different purposes. The purpose of a credit, as the Court found in *Nyquist*, is to operate as an incentive. *Nyquist*, *supra*, 413 U.S. at 799. However, under one theory, the purpose of a tax deduction is not to operate as an incentive, but to assist in arriving at an equitable and realistic definition of taxable income. *See* Andrews, *Personal Deductions in an Ideal Income Tax*, 86 Harvard L. Rev. 2 (1972). It is both equitable and reasonable for Minnesota to exclude from one's taxable income those earnings devoted to education.

Rather, the deduction is designed to reduce the effect of taxes on choices among educational expenditures by conferring benefits in direct relationship to a taxpayer's actual education expenditures. The statute in *Nyquist* extended direct benefits based solely on the taxpayer's act of enrolling a child in a private school. It was "apparently designed to yield a prior-determined amount of tax forgiveness in exchange for performing a specific act . . . ." *Nyquist, supra,* 413 U.S. at 789. In substance, the tax system had been employed to actively distribute a precise benefit to those taxpayers sending children to private, predominately religious, schools.[12]

The Minnesota deduction serves no such function. Thus, even if plaintiffs could establish that the majority of the tax benefit provided by the deduction flows primarily to sectarian schoolchildren, this fact is not controlling. *See Nyquist, supra,* 413 U.S. at 794. What is important is the operation of the tax benefit. As demonstrated above, the Minnesota deduction, unlike the provisions at issue in *Nyquist,* operates as a true tax deduction. As a result, to the extent that the statute benefits religious institutions at all, it extends that benefit passively and not by means of any affirmative grant, subsidy, or reward. The statute cannot therefore be said to have a primary effect which either advances or inhibits religion. This Court must exercise care that it does not prevent the state from extending its "general [s]tate law benefits to all its citizens without regard to their religious belief." *Everson v. Board of Education, supra,* 330 U.S. at 16. Those who send

[12] Tax systems have been employed in a similar fashion elsewhere. *E.g., Public Funds for Public Schools v. Byrne, supra,* ($1000 tax exemption for each child in private school); *Kosydar v. Wolman,* 353 F. Supp. 744 (S.D. Oh. 1972), *aff'd sub nom., Grit v. Wolman,* 413 U.S. 901 (1973) (tax credit producing dollar-for-dollar rebate for "extraordinary" expenses). In each case, the active, promotional function of the tax benefit resulted in its invalidation.

their children to religious institutions "need not be quarantined from public benefits that are neutrally available to all." *Roemer v. Board of Public Works, supra,* 426 U.S. at 746.

Plaintiffs have also contended that the challenged statute fails to adequately ensure that deductions will be taken by individual taxpayers only for secular expenses. No such requirement applies to true tax deductions and exemptions. Just as in *Walz, supra,* the passivity and indirectness of any benefit to religion flowing from the deduction renders any additional protection from sectarian aid unnecessary.

The indicia of neutrality applied under the primary effect test support the conclusion that Minn. Stat. § 290.09, subd. 22, is constitutional. Its benefits are available to a class of taxpayers which includes parents of students in schools which are private and public, secular and sectarian. The statute provides a true tax deduction which, if it benefits religious institutions at all, extends that benefit passively and not by means of any affirmative grant, subsidy, or reward. It does not have a primary effect which advances religion.

C. The Minnesota Tax Deduction Has A Secular Legislative Purpose.

Before the district court, plaintiffs did not present any argument that the challenged statute violated the first or "secular purpose" prong of the establishment clause test. *Mueller v. Allen, supra,* 514 F. Supp. at 1001. Before the court of appeals, they merely alleged that the facts which demonstrated an impermissible primary effect also showed that the challenged section has an improper legislative purpose. Both lower courts found "no indicia of an invalid nonsecular purpose." *Mueller v. Allen, supra,* 676 F.2d at 1198. Rather, they concluded that the "manifest purpose of the statute is

to provide all taxpayers a benefit which will . . . enhance the quality of education in both public and private education." *Id.*

On this point, the lower court opinions can engender little dispute. As has been recognized throughout establishment clause jurisprudence, the state has a valid secular purpose in seeking not to hinder the ability of its residents to provide their dependents with a safe, effective and varied educational environment. *See Wolman v. Walter, supra*; *Meek v. Pittenger*, 421 U.S. 349 (1975); *Nyquist, supra.* While plaintiffs now have sought to bolster their contention that the statute was born of a sectarian purpose, that effort relies on arguments which are disingenuous at best.

First, plaintiffs suggest that, while the statute's "ultimate purpose" is secular (i.e., to enhance the education of its schoolchildren), its "immediate purpose" is unconstitutional because it uses "state aid to religious institutions to advance that [ultimate] secular purpose." Petitioners' Brief at 68-69. In so dissecting the purpose prong of the *Lemon* test, plaintiffs engage in the kind of "legalistic minuet" in which this Court has said it will not participate. *Lemon v. Kurtzman, supra*, 403 U.S. at 614. Moreover, their construction of Minnesota's "immediate means" is erroneous, for Minn. Stat. § 290.09, subd. 22, does not use "state aid to religious institutions" to advance education, but rather uses tax deductions available to all taxpayers for certain education expenses to accomplish that "ultimate purpose."[13]

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[13] Even the case law upon which plaintiffs rely betrays their argument. In *Stone v. Graham*, 449 U.S. 39 (1980), "the pre-eminent purpose for posting the Ten Commandments on school room walls [was] plainly religious in nature." *Id.* at 41. However, this Court specifically found that even cases involving active state assistance to private schools are easily distinguishable from *Stone* because "[s]uch assistance has the obvious legitimate secular purpose of

Second, plaintiffs recite the history of Minn. Stat. § 290.09, subd. 22, positing that it demonstrates a sectarian purpose. An amendment to § 290.09, subd. 22, was introduced following the decision in *Minnesota Civil Liberties Union v. State*, 302 Minn. 216, 224 N.W.2d 344, *cert. denied*, 412 U.S. 998 (1974), which struck down a tuition tax credit provision. Petitioners' Brief at 70-71. However, that fact fails to show any improper purpose. Not only did the amendment follow the *MCLU v. State* decision by more than a year, the tax credit which plaintiffs say was replaced by the amended deduction was never found to have an improper purpose. *MCLU v. State, supra*, 302 Minn. at 226, 224 N.W.2d at 349. Equally important is that the deduction, enacted in 1955, can hardly be seen as a replacement for a law adopted and struck down in the 1970's. Even if some direct relationship existed between the two laws, that fact would not render the deduction's purpose invalid. *See, e.g., Committee for Public Education and Religious Liberty v. Regan, supra*, wherein the Court upheld a New York nonpublic school aid statute after the Court struck down two prior New York statutes in *Levitt v. Committee For Public Education and Religious Liberty*, 413 U.S.

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promoting educational opportunity. The posting of the Ten Commandments on classroom walls has no such secular purpose." *Id.* at 43 n.5.

Plaintiffs' reliance on an article by Professor Ely in their "ultimate purpose" analysis, Petitioners' Brief at 68, is equally misplaced. In that article, Professor Ely states that, with regard to the religion clauses, "[a] choice legitimately justifiable in terms of a nonreligious and otherwise permissible goal should be upheld, without inquiry into motivation." Ely, *Legislative & Administrative Motivation in Constitutional Law*, 79 Yale L.J. 1205, 1324 (1970).

472 (1973) and *Nyquist, supra*. The introduction and enactment of the amendment to Minn. Stat. § 290.09, subd. 22, demonstrates only the Minnesota legislature's interest in continuing to effectuate its valid secular purpose of aiding education in a constitutionally acceptable manner.

Finally, plaintiffs make a curious attempt to show that the deduction has an improper purpose by reference to an entirely different law. Petitioner's Brief at 74-76. They suggest that amendments in 1978 to the Minnesota Aids to Nonpublic Schools Act, Minn. Stat. §§ 123.931 to 123.947 (1980), somehow tainted the deduction adopted in 1955 and amended in 1976. In 1975, the Minnesota legislature enacted 1975 Minn. Laws ch. 396 which provided for the distribution of texts, instructional materials and auxiliary aids to nonpublic schools. In 1976, chapter 396 was upheld by a three-judge panel. *Minnesota Civil Liberties Union v. Casmey*, No. 3-76-8 (D. Minn. Nov. 30, 1976). That decision was remanded by this Court for reconsideration in light of *Wolman v. Walter, supra*. *MCLU v. Casmey*, 433 U.S. 903 (1977). On remand, the district court did not strike down the program as it related to sectarian schools, as plaintiffs contend. Petitioners' Brief at 74-75. Rather, the parties stipulated to limit the aid which would be granted to sectarian nonpublic schools. The district court approved the stipulation and also held that the provisions of chapter 396, granting aid to nonsectarian nonpublic schools, were severable and could remain in force. *MCLU v. Casmey, supra*, slip. op. at 2 (D. Minn. Oct. 31, 1977).

Contrary to plaintiffs' allegations, the legislature did not respond to the *Casmey* decision by "abruptly" terminating the program established in 1975. Petitioners' Brief at 75. Rather, in 1978, the legislature merely amended the program to bring

it in line with *Wolman v. Walter, supra.*[14] It deleted the provision of instructional materials, equipment and auxiliary services, and added the provision of textbooks, standardized tests, guidance and counseling services and health services. This legislative action was intended only to provide aid to nonpublic schools in a constitutionally acceptable manner. No improper purpose can be imputed to it. Plainly, it provides no support to plaintiffs' contention that the challenged deduction has an improper purpose.

D. The Statute Does Not Promote Excessive Government Entanglement With Religion.

The entanglement test concerns the excessive involvement of the state in church-related areas. Enforcement of the challenged provision occasions no such interference. The only potential state involvement under the statute is the determination of whether a particular deduction was properly taken. Such a determination involves only a routine audit of an individual taxpayer. This is not entanglement. *See Committee for Public Education and Religious Liberty v. Regan, supra,* 444 U.S. at 660. (Straightforward process susceptible to routinization does not violate the entanglement prong).

In fact, tax decisions are frequently made on the basis of whether an organization is or is not a religious organization. However, those decisions do not impermissibly entangle the state in church affairs. *Walz, supra* (upholding a property

[14] As plaintiffs indicate, the 1978 legislature also provided for the distribution of instructional materials to certain nonsectarian, nonpublic schools for the period April 5, 1978, to June 30, 1979. 1978 Minn. Laws, ch. 733, § 19. However, as the above discussion demonstrates, this provision was hardly the full extent of the nonpublic school aid program, as plaintiffs erroneously contend. Petitioners' Brief at 75.

tax exemption although state review would be required to determine whether property was devoted to a religious purpose).

The type of church-state involvement that is forbidden by the entanglement prong is far removed from the individual audit presented here. In cases where the Court has found an entanglement violation, it has been concerned with systematic state surveillance of teachers within the parochial school and with review of the religious institution's records to determine the amount of reimbursable expenditures attributable to religious activity. *Meek v. Pittenger, supra*; *Lemon v. Kurtzman, supra.* The key constitutional difficulty found in those cases has been the creation of an ongoing relationship between state and church.

No systematic surveillance of parochial school activity is involved in this case and no review of an institution's records is required. Thus, there has been no creation of an ongoing church-state relationship forbidden by the entanglement prong. Moreover, since the Court has held that even state audits of parochial school records may be permissible, *Committee for Public Education and Religious Liberty v. Regan, supra,* there is no question that the limited audit utilized here survives entanglement scrutiny.

Similarly, plaintiffs have failed to present any plausible argument as to why a tax deduction will result in political entanglement of church and state. The twenty-seven year history of the statute reveals no political controversy along sectarian lines. Further, the deduction provided under the challenged statute is fundamentally different from the direct assistance programs which have been thought to engender political entanglement. *Cf. Lemon v. Kurtzman, supra.* Critical to the holding in *Lemon* was the fact that annual appropria-

tions were required to further the challenged program. Similarly, in *Nyquist, supra,* the Court, while not expressly finding an entanglement violation, did express concern with the annual appropriation required in that program. As with administrative entanglement, the concern with political entanglement results from the creation of an ongoing relationship between the church and state. In this context, the relationship occurs in the political appropriations process.[15] With a tax deduction, however, no annual appropriation is required. Thus, the concerns expressed in *Lemon* and *Nyquist* are obviated. The only political process implicated is the decision whether to pass, repeal, or amend a statute. No case has ever suggested that a statute should be invalidated so that religious organizations are less likely to exercise their constitutionally protected rights of speech and petition. *See McDaniel v. Paty,* 435 U.S. 618 (1978).

It is clear that the challenged statute will promote neither administrative nor political entanglement. The plaintiffs' arguments to the contrary must be rejected.

II. EVEN IF THE MINNESOTA TAX DEDUCTION IS NOT CONSTITUTIONAL IN ITS ENTIRETY, THE TRANSPORTATION AND TEXTBOOK PORTION OF THE STATUTE MAY PROPERLY BE SEVERED AND UPHELD.

Under Minnesota law, all statutes are to be construed as severable in the absence of an express legislative indication to the contrary. Minn. Stat. § 645.20 (1980). Minn. Stat. § 290.09, subd. 22 (1980), does not contain a non-severability clause,

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[15] However, even an ongoing need for appropriations will not always result in a finding of impermissible entanglement. *Roemer v. Board of Public Works, supra.*

and the transportation, textbook, and tuition portions of the statute are not so interrelated as to make severability impossible or illogical. Accordingly, if this Court should determine that all portions of section 290.09, subd. 22 cannot be applied in a constitutional manner, the remaining portions should be severed and sustained.

The constitutionality of the deduction for transportation expenses cannot reasonably be doubted. In *Everson v. Board of Education, supra,* the Court held constitutional a New Jersey statute which authorized the state to reimburse parents for the cost of transporting their children to nonpublic schools on public bus lines. The continued validity of *Everson* is not contested by plaintiffs. Thus, since a tax deduction program is necessarily more favored under the establishment clause than a reimbursement program, the challenged section must be sustained insofar as it authorizes a tax deduction for expenses incurred in transporting dependents to and from school.

The petitioners complain that the deduction may be taken for field trip transportation and that such a deduction is contrary to the Court's decision in *Wolman v. Walter, supra.* In that case, the Court ruled that the state could not provide field trip transportation to sectarian schools because of the control maintained by the schools over the frequency and purpose of the trips. But the Court was not presented there with the inherently indirect and passive tax deduction presented here. Much as deductions for other payments to the school of one's choice do not result in an impermissible "advancement of religion," those for transportation do not.

Similarly, the Minnesota tax deduction must be upheld as it pertains to textbooks. This conclusion is compelled by a number of decisions in which the Court has held constitutional

programs providing secular textbooks to nonpublic school students. *See Wolman v. Walter, supra*; *Meek v. Pittenger, supra*, 421 U.S. at 359-62; *Board of Education v. Allen, supra*. Again, the continued validity of these cases is not contested by plaintiffs and, again, approval of direct assistance programs in *Wolman, Meek* and *Allen* compel the approval of a tax deduction serving the same function.[16]

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[16] Plaintiffs contend that the deduction somehow results in deductions for sectarian textbooks because Minnesota provides for the loan of secular textbooks to both public and private schools. Petitioners' Brief at 81. Since the challenged law prohibits deductions for sectarian texts, plaintiffs' argument essentially is that parents of sectarian students are violating the challenged statute. However, they submit no evidence to support this proposition, nor do they suggest why violations of a statute render that statute unconstitutional.

CONCLUSION

For the reasons stated, the decision of the court of appeals should be affirmed and the challenged statute upheld.

January, 1983.

Respectfully submitted,

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APPENDIX

APPENDIX A

Distribution of Dependent Expenses Deduction
By Size of Dependent Expenses Deduction ($100 brackets)
Estimated from a Sample of 1980 M-1 Returns

Size of Dependent Education Expenses Deduction	Number of Returns	Number of Dependents
$ 1 - $ 100	29,470	58,024
101 - 200	15,341	39,732
201 - 300	8,524	19,092
301 - 400	5,127	11,803
401 - 500	3,582	9,007
501 - 600	3,806	9,889
601 - 700	3,108	9,456
701 - 800	6,793	14,399
801 - 900	1,094	3,377
901 - 1,000	1,172	3,436
1,001 - 1,100	1,091	2,279
1,101 - 1,200	556	1,524
1,201 - 1,300	755	2,502
1,301 - 1,400	720	2,423
1,401 - 1,500	1,841	4,814
1,501 - 1,600	394	2,279
1,601 - 1,700	12	74
1,701 - 1,800	589	2,622
1,801 - 1,900	144	68
1,901 - 2,000	441	1,653
2,001 - 2,100	61	252
2,101 - 2,200	292	1,152
2,201 - 2,300	4	22
2,301 - 2,500	94	461
2,501 - 2,700	345	1,732
2,701 - 3,000	348	2,329
Over $3,000	45	269
	85,749	204,670

Source: Minnesota Department of Revenue
Research Office
October 28, 1982

APPENDIX B

Distribution of Dependent Education Expenses Deduction By Size of Dependent Education Expenses Deduction From the 1978 Individual Income Tax Sample

Size of Dependent Education Expenses Deduction	Number of Returns	Number of Dependents
$ 1 - $ 100	3,502	7,697
101 - 200	4,341	13,052
201 - 300	3,492	8,736
301 - 400	3,176	8,129
401 - 500	2,862	7,656
501 - 600	2,773	5,860
601 - 700	1,584	4,354
701 - 800	4,092	10,488
801 - 900	862	2,633
901 - 1,000	678	2,405
1,001 - 1,100	1,169	3,500
1,101 - 1,200	342	885
1,200 - 1,300	488	1,225
1,301 - 1,400	220	1,063
1,401 - 1,500	1,200	3,367
1,501 - 1,600	271	1,104
1,601 - 1,700	353	905
1,701 - 1,800	235	694
1,801 - 1,900	40	202
1,901 - 2,000	233	720
2,001 - 2,100	111	488
2,101 - 2,200	365	1,288
2,201 - 2,300	22	109
2,301 - 2,500	122	533
Over 2,500	317	1,795
	32,850	88,888

Source: Minnesota Department of Revenue
Research Office
October 28, 1982